Supreme Court, U.S.
FILED

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No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALLSTATE INSURANCE COMPANY,
AN ILLINOIS CORPORATION,

Petitioner,

v.

HON. MARK A. KARL, JUDGE OF THE
CIRCUIT COURT FOR MARSHALL COUNTY, WEST VIRGINIA,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Consistent with the requirements of procedural due process of law, may a tort plaintiff's automobile insurance carrier which provides underinsured motorist coverage to the plaintiff and which may thereby be liable to the plaintiff for any damages in excess of the tortfeasor's liability insurance coverage, be directly bound by a judgment in the underlying action between the plaintiff and the tortfeasor where the underinsured motorist carrier is denied the opportunity to intervene or otherwise participate therein absent a showing that the tortfeasor defendant is, in bad faith, failing to protect its interests?

II. Is a person or entity which may be bound directly by a judgment denied due process of law where, in the action from which that judgment may emanates, it is denied the opportunity to participate in the litigation, to present every defense available to it, to present those defenses in the manner it deems will be most productive, and to refrain from presenting those defenses which it deems will be non-productive and is compelled instead to rely upon the defenses advanced by another litigant with whom it is not in privity and with whom it does not share a unity of interest?

III. Does West Virginia Code § 33-6-31(d)(1992), as construed by the Supreme Court of Appeals of West Virginia herein, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution in requiring that, absent a showing of bad faith, an underinsured motorist insurance carrier which may be bound directly by a judgment in the underlying action between the plaintiff and the tortfeasor must rely only upon those defenses advanced by the tortfeasor defendant?

PARTIES TO THE PROCEEDINGS BELOW

Allstate Insurance Company, an Illinois corporation.[1]

Hon. Mark A. Karl, Judge of the Circuit Court for Marshall County, West Virginia.

Norma J. Carr, Moundsville, W. Va.

Jamie Lynn Brooks, Moundsville, W. Va.

James E. Brooks, Moundsville, W. Va.

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[1]The Allstate Insurance Company is a subsidiary of the Allstate Corporation, Allstate Holdings, Inc., both Delaware corporations, and Sears, Roebuck & Co., Inc., an Illinois corporation. Its non wholly-owned subsidiaries are Allstate Auto & Fire Insurance Company, Ltd., Sayson Life Insurance Company, Ltd., Samshin Allstate Life Insurance Company, Ltd. and Tramed, a Russian business entity.

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DECISION PRESENTED FOR REVIEW & JURISDICTIONAL STATEMENT

The decision presented for review is *State of West Virginia ex. rel. Allstate Insurance Company v. Karl*, No. 21818 (W. Va. Oct. 29, 1993). It has not yet been assigned a volume and page citation in either the official West Virginia Reports or the Southeastern Reporter 2d. Its Westlaw reference is 1993 WL 440284 and a copy of the decision appears at *Appendix, Tab "A"* hereto.

The decision presented for review is a final order of the Supreme Court of Appeals of West Virginia (hereinafter "Supreme Court of Appeals") entered on October 29, 1993, and denying this Petitioner's Petition for Writ of Prohibition to enjoin the Respondent hereto from proceeding with the case of *Carr v. Brooks*, Civil Action No. 93-C-72-K, pending in the Circuit Court for Marshall County, West Virginia,[2] in light of orders entered therein foreclosing this Petitioner's right to participate in discovery and the trial of the action and to take steps necessary to protect and defend its interests. In so doing, the Court below construed West Virginia Code § 33-6-31(d) (1992) in a manner which this Petitioner contends is repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Accordingly, jurisdiction is properly vested in this Court pursuant to 28 U.S.C. § 1257(a) (1988). This Petitioner does not contest herein the construction placed upon the West Virginia statute by the Supreme Court of Appeals and accepts that construction as the final and binding enunciation of the meaning of the statute and this Petitioner's rights thereunder. Rather, this Petitioner argues that, as the statute is construed by the

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[2]This case remains pending as of this writing.

Supreme Court of Appeals, it is violative of the principles of due process.

PRINCIPAL CONSTITUTIONAL PROVISIONS & STATUTES

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ".

U.S. Const., amend. XIV, § 1.

• • •

> Any insured intending to rely on the coverage required by subsection (b) of this section shall, if any action be instituted against the owner or operator of an uninsured motor vehicle, cause a copy of the summons and a copy of the complaint to be served upon the insurance company issuing the policy, in the manner prescribed by law, as though such insurance company were named a party defendant; such company shall thereafter have the right to file pleadings and to take other action allowable by law in the name of the owner, or operator, or both of the uninsured or underinsured motor vehicle or in its own name.

W. Va. Code § 33-6-31(d) (1992).

STATEMENT OF THE CASE

The present matter arises from a personal injury negligence action, now pending in the Circuit Court for Marshall County, West Virginia, spawned by a garden-variety automobile collision. *Norma J. Carr v. Jamie Lynn Brooks & James G. Brooks*, Civil Action No. 93-C-72-K (Cir. Ct., Marshall County, W. Va., filed Feb. 19, 1993). The *ad damnum* of the Plaintiff's Complaint exceeds the Defendants' liability insurance coverage available to satisfy a judgment for the Plaintiff. Accordingly, the Plaintiff also seeks in the underlying litigation to establish this Petitioner's liability to her, pursuant to the underinsured motorist coverage provisions of her contract of automobile insurance with this Petitioner, for any damages awarded in excess of the Defendants' liability insurance coverage. This Petitioner raises no defenses to its obligation to satisfy such an "excess verdict," up to the limits of underinsured motorist coverage provided under its contract of insurance with the Plaintiff.[3] The only issues in contention are whether the defendants are liable to the plaintiff and, if so, the extent of the Plaintiff's damages.

It is established law in West Virginia that, while an insurer providing underinsured motorist coverage (hereinafter "underinsured motorist carrier") is not a party to the underlying tort action, it may not later contest the tortfeasor's liability to the plaintiff, the extent of the plaintiff's injuries, or the *quantum* of damages awarded if it had been properly

[3]However, such defenses may subsequently arise, particularly if the plaintiff should take any actions which might foreclose or prejudice this Petitioner's subrogation rights as to any monies paid pursuant to the contract of insurance.

placed upon notice of the underlying action.[4] *Postlethwait v. Boston Old Colony Ins. Co.*, 189 W. Va. 532, ___,[5] 432 S.E.2d 802, 806 (1993). Thus, the underinsured motorist carrier in such a situation is bound by the judgment in the underlying action and may thereafter assert only "policy defenses," based upon the terms and conditions of the contract of insurance, thereby negating its duty to extend underinsured motorist coverage. This Petitioner was provided with such notice of the underlying action and, because it raises no "policy defenses," seeks only to hold the Plaintiff to strict proof of the Defendants' liability to her and the existence and extent of her compensable injuries, if any.

In order to do so, this Petitioner sought, upon being placed on notice of the underlying litigation, to participate therein, relying upon the black-letter of West Virginia Code § 33-6-31(d) (1992). Section 33-6-31(d) provides that an underinsured motorist carrier that has been placed upon notice, notwithstanding any actions which may be taken by the tort defendant, "shall thereafter have the right to file pleadings and to take other action allowable by law in the name of the owner, or operator, or both of the . . . underinsured motor vehicle or in its own name." *Id.* Accordingly, this Petitioner filed an Answer to the Plaintiff's Complaint in its own name which set forth various affirmative defenses "on behalf of itself and on behalf of the interests of the named Defendants." Thereafter, this Petitioner served interrogatories and requests for production of documents upon the Plaintiff, in its own

[4]This is accomplished by serving a copy of the Summons and Complaint upon the underinsured motorist carrier "as though such insurance company were a named party defendant[.]" W. Va. Code § 33-6-31(d) (1992).

[5]This volume of the West Virginia Reports is not yet in print nor are advance sheets yet available.

name as "Notice-Defendant."[6] The named Defendants to the underlying action also filed an Answer denying the Plaintiff's claim and setting forth affirmative defenses. As of the date of the Respondent's rulings at issue here, however, the Defendants had not sought written discovery.

In response thereto, the Plaintiff filed a motion to limit this Petitioner and the named Defendants to a single Answer to the Plaintiff's Complaint. *See* Appendix, Tab "B". It was the Plaintiff's position that the tortfeasor Defendant and the underinsured motorist carrier could present only a single unified defense to the merits of the Plaintiff's case. *Id.; see also* Appendix, Tab "F". As part of this motion, the Plaintiff sought to bind the tortfeasor Defendant to the Answer filed by this Petitioner by preventing the Defendant from filing a separate Answer. In a companion motion, the Plaintiff sought to strike eight affirmative defenses reserved by this Petitioner in its Answer, four of which would have been waived pursuant to West Virginia Rule of Civil Procedure 12(h)(1) had they not been asserted in the Petitioner's responsive pleading. *See* Appendix, Tab "C".

In other motions, the Plaintiff sought to compel this Petitioner to make an irrevocable election as to whether it was "appearing" in its own name or that of the tortfeasor Defendants. *See* Appendix, Tab "D". It was the Plaintiff's assertion that this Petitioner might conduct discovery only if it elected to proceed in its own name and that, if this

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[6]The West Virginia Rules of Civil Procedure are virtually identical to the Federal Rules of Civil Procedure prior to the latest amendments thereto. Thus, interrogatories and requests for production of documents are available as a matter of right to litigants. *Compare* Fed. R. Civ. P. 33 (interrogatories) *and* Fed. R. Civ. P. 34 (requests for production of documents) *with* W. Va. R.C.P., Rule 33 (same) *and* W. Va. R.C.P., Rule 34 (same).

Petitioner "appeared" on behalf of the interests of the tortfeasor Defendant, only this Petitioner or the tortfeasor Defendant might conduct discovery so as not to subject the Plaintiff to duplicative discovery. As a companion to this, the Plaintiff sought a protective order pursuant to West Virginia Rule of Civil Procedure 26, seeking to avoid responding to the interrogatories and requests for production of documents theretofore propounded to her by this Petitioner. *See* Appendix, Tab "E".

On June 28, 1993, the Respondent granted the Plaintiff's motion to limit this Petitioner and the tortfeasor Defendant to a single Answer and confined them to presenting a unified defense on the merits of the Plaintiff's claim. *See* Appendix, Tab "F". The Respondent also granted both the Plaintiff's motion to require this Petitioner to make an irrevocable election as to the capacity in which it "appeared" in the underlying action, as well as the Plaintiff's motion for protective order. *Id.* With regard to the Plaintiff's motion to strike the affirmative defenses which had been reserved, the Respondent granted it in part and denied it in part. *Id.*

This Petitioner viewed these rulings -- which had the effect of preventing it from fully participating in the underlying action except in conjunction with the tortfeasor Defendants, with whose interests the interests of this Petitioner were not aligned -- as contrary to West Virginia Code § 33-6-31(d) (1992) and its right to procedural due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and article III, section 10 of the West Virginia Constitution. Accordingly, this Petitioner turned to the Supreme Court of Appeals of West Virginia[7] for relief, seeking on these grounds a Writ of Prohibition enjoining the

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[7]West Virginia has no intermediate courts of appeal.

Respondent from proceeding with the underlying tort litigation, as postured in light of the Respondent's foregoing rulings. The issue was briefed and argued by the Plaintiff and this Petitioner. *See* Briefs of Counsel, Appendix, Tabs "G" and "H". Neither the Respondent nor the tort Defendants presented written or oral arguments, though they were duly served with all papers relevant to the matter.

The final order of the Supreme Court of Appeals was handed down on October 29, 1993. *See* Appendix, Tab "A". In it, the Supreme Court of Appeals not only affirmed the position taken by the Respondent, but further limited the rights of underinsured motorist carriers to protect their interests by participating in the underlying tort litigation. The position taken by the Supreme Court of Appeals is that a tortfeasor defendant has a duty of good faith to protect the interests of the underinsured motorist carrier and that, as a result, the underinsured motorist carrier has no right to participate therein unless it can demonstrate that the tortfeasor Defendant is defending the claim in a bad faith manner with regard to the interests of the underinsured motorist carrier.[8] It is the position of the Supreme Court of Appeals that the underinsured motorist carrier's right of subrogation against the tortfeasor for any monies it may be compelled to pay[9] amply protects the underinsured motorist carrier's rights and interests. *See State ex rel. Allstate Ins. Co. v. Karl*, No. 21818, 1993 WL 440284, slip op. at 11 (W. Va. Oct 29, 1993), Appendix at 17. Alternatively, the Court held that the

[8]Presumably, this holding also rejects the right of an underinsured motorist carrier to seek permissive intervention pursuant to West Virginia Rule of Civil Procedure 24 other than upon a showing of bad faith.

[9]A standard provision in virtually every policy of automobile insurance as well as West Virginia Code § 33-6-31 (1992).

underinsured motorist carrier could participate in the underlying litigation only where the tortfeasor's liability carrier has declined to defend, where it appears that a default judgment might be entered against the tortfeasor, or where the tortfeasor agrees to be jointly defended by both his own counsel and that of the underinsured motorist carrier.

Specifically, the Supreme Court of Appeals rejected this Petitioner's claims that the posture into which it was cast by the rulings of the Respondent constitute a violation of its Fourteenth Amendment right to procedural due process of law. This argument was made in this Petitioner's Consolidated Brief in Opposition to the aforesaid motions interposed by the Plaintiff, *see* Appendix, Tab "I", and throughout the entirety of its Petition for Writ of Prohibition, *see* Appendix, Tab "G". This constitutional issue was not addressed by the Respondent in his perfunctory Order, which was drafted by counsel for the Plaintiff. *See* Appendix, Tab "F". It was addressed at Part IV of the opinion of the Supreme Court of Appeals, in which the Court stated:

> In this type of litigation, the named defendant is the tortfeasor. It is this party who has due process rights. . . . Thus, we conclude that an underinsured motorist carrier does not have a due process right to assume independent control of the defense of a tortfeasor who is represented by a liability carrier.

State ex rel. Allstate Ins. Co. v. Karl, No. 21818, 1993 WL 440284, slip op. at 15-16 (W. Va. Oct 29, 1993), Appendix at 21-22.

It is this ruling to which this Petitioner presently excepts, recognizing that, for purposes of the present appeal,

the holdings of the Supreme Court of Appeals regarding the construction of West Virginia Code § 33-6-31(d) and article III, section 10 of the West Virginia Constitution must be viewed as final, binding and determinative of its rights under state law. Accordingly, this Petitioner seeks *certiorari* only upon the federal constitutional question raised and decided below and presented herein. This Petitioner does not herein request that a writ of prohibition be issued against the Respondent, but that the decision of the West Virginia Supreme Court of Appeals be reversed and remanded for further proceedings consistent with the procedural due process guarantee of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I. PREFACE.

Litigation involving underinsured motorist claims is atypical in that it necessarily concerns three adversaries, rather than two, whose interests, to a greater or lesser degree, are hostile to one another. As in all actions at law, the plaintiff's interest is in establishing the liability of the tortfeasor defendant and maximizing the award of damages against the tortfeasor. In addition, the tortfeasor defendant's principal interest typically lies in defeating the plaintiff's claim altogether or, failing that, minimizing the damages which the plaintiff may recover. However, if it appears that the liability of the defendant will be established and that the plaintiff's compensable damages will exceed the tortfeasor's liability coverage, the tortfeasor in many instances has no interest in minimizing any "excess judgment" which may be rendered and for which the underinsured motorist carrier will be liable. By contrast, the underinsured motorist carrier is concerned with minimizing any excess judgment, but has little interest in defeating the plaintiff's claim altogether or minimizing the damages award so long as it appears that it will be within the policy limits of the tortfeasor's liability insurance.[10]

Under traditional methodologies, a plaintiff's underinsured motorist carrier, having suffered no injury by the tort and having no wrongful conduct alleged to it, could not be a party to the underlying tort action between the plaintiff and the defendant and, thus, could not be bound by any judgment rendered therein. It was necessary for the plaintiff

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[10]This dissimilarity of interests between the tortfeasor and the underinsured motorist carrier is more fully addressed at *infra*, Part II. A. of this Argument.

to first obtain his judgment against the defendant and then demand the excess portion of it from his underinsured motorist carrier. If the underinsured motorist carrier contested either its duty to pay such damages or the amount of such damages, the plaintiff might then sue the underinsured motorist carrier under the contract of insurance between the plaintiff and the underinsured motorist carrier. Because the underinsured motorist carrier was not bound by the judgment in the underlying tort action, it was not foreclosed from contesting and relitigating the tortfeasor defendant's liability to the plaintiff or the existence or extent of the plaintiff's damages upon which its duty to pay is predicated.

In order to avoid such a waste of judicial resources and eliminate such duplicative litigation, numerous states enacted procedures whereby the underinsured motorist carrier might assert its defenses and protect its interests in the underlying tort action and, thus, be bound by it. West Virginia has statutorily enacted such a procedure, W. Va. Code § 33-6-31(d) (1992), and it is established law in West Virginia that an underinsured motorist carrier who has been duly placed upon notice of the underlying tort action will be estopped from later contesting either the tortfeasor's liability to the plaintiff or the existence or extent of the plaintiff's injuries which are the predicates to the underinsured motorist carrier's duty to compensate the plaintiff. *Postlethwait v. Boston Old Colony Ins. Co.*, 189 W. Va. 532, 432 S.E.2d 802, 806 (1993) ("[W]here the suit is filed against the tortfeasor and a copy is served upon the uninsured/underinsured motorist carrier, the judgment against the tortfeasor would be binding upon the carrier under the doctrine of collateral estoppel . . . .").

In construing this statute, the Court below holds that, even though it will be bound by the judgment in the underlying action, the underinsured motorist carrier may not

ordinarily participate therein, but must rely upon the tortfeasor defendant to protect its interests. *Allstate Ins. Co. v. Karl*, slip op. at 15-16, Appendix at 21-22. The Court imposes a duty of "good faith" upon the tortfeasor defendant[11] and asserts that the fact that the underinsured motorist carrier may have subrogation against the tortfeasor defendant for such sums as it is required to pay, is sufficient to protect its interests and motivate the tortfeasor defendant to discharge his duty of good faith. *Id.* at 10, Appendix at 15. Because this duty of good faith casts counsel for the tortfeasor defendant in the role of representing two parties whose interests are potentially adverse, at least in part, it is implicitly something less than a fiduciary duty toward the underinsured motorist carrier.[12]

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[11]The Supreme Court of Appeals framed this concept within the context of the duty being imposed upon the tortfeasor's *insurance carrier*, apparently failing to recognize that it is the tortfeasor defendant who is the client of the attorney defending him -- not his insurance carrier. Thus, nominally at least, it is the tortfeasor defendant and not his insurance carrier who has the right to control the conduct of his defense.

[12]Clearly, counsel for the tortfeasor defendant owes his client the highest duty of good faith, loyalty and dedication to his client's interests. *See generally May v. Seibert*, 164 W. Va. 673, 264 S.E.2d 643 (1980); W. Va. R. Prof. Cond., Rule 1.3 & cmt. He cannot assume the same duty toward another whose interests may become adverse to those of his client, such as where it would be in the best interests of the tortfeasor defendant to proceed to trial in an effort to defeat the plaintiff's claim altogether while it would be in the best interests of the underinsured motorist carrier to settle the claim within the policy limits of the tortfeasor's liability coverage. Clearly, then, counsel's duty toward the underinsured motorist carrier cannot arise to the level of a fiduciary duty where he has already undertaken such a duty to the tortfeasor defendant.

Modern underinsured motorist litigation is, thus, tripartite in nature[13] and the central issue arises as to whether binding the defenses of two disparate parties in interest to a single defense by denying one the opportunity to participate in the action, as the Court below has done, effectively denies the underinsured motorist carrier due process of law.

II. DUE PROCESS REQUIRES THAT THIS PETITIONER BE PERMITTED TO PARTICIPATE IN THE UNDERLYING TORT ACTION TO THE SAME EXTENT AS THE NAMED PARTIES IF IT IS TO BE BOUND BY THE JUDGMENT THEREIN.

It is axiomatic that a judgment cannot bind one who is not a party to the action or who is not made a party by service of process. *Martin v. Wilks*, 490 U.S. 755 (1989); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Blonder-Tongue Lab., Inc. v. University Foundation*, 402 U.S. 313 (1971); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Hansberry v. Lee*, 311 U.S. 32 (1940).[14] While this Petitioner has been served with process in the underlying litigation, it is explicitly and implicitly not a party thereto. West Virginia Code section 33-6-31(d) (1992) provides that the underinsured motorist carrier may be served with the summons and complaint *as though* it were a named party defendant. Additionally, it is held that section 33-6-31(d) does not constitute or authorize a direct action against the underinsured motorist carrier. *Davis v. Robertson*, 175 W. Va. 364, 332 S.E.2d 819 (1985).[15]

Regardless of whether this Petitioner is deemed a party or nonparty to the underlying litigation, due process requires that, where it may be deprived of life, liberty or property as the result of litigation, this Petitioner must have a *meaningful opportunity* to defend its interests. *Boddie v. Connecticut*, 401 U.S. 371 (1971). This requires that this Petitioner be afforded the opportunity to present every defense available to it. *Lindsey v. Normet*, 405 U.S. 56 (1972); *American Sur. Co. v. Baldwin*, 287 U.S. 156 (1932). It is implicit in this view and necessarily follows from it that meaningful opportunity to defend likewise encompasses the opportunity to present its defenses in the manner that it deems most beneficial and to refrain from presenting defenses which it believes will serve no benefit.

In the present case, the Supreme Court of Appeals has denied this Petitioner the right to participate in litigation which may result in a judgment which is binding upon it. This Petitioner has been denied the right to file an Answer or other papers, to participate in discovery, to advance motions or to take part in the trial of the matter. Instead, this Petitioner is compelled to rely upon the defenses asserted by the tortfeasor Defendant to protect its interests unless it can meet the high

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[13]Even though only the plaintiff and tortfeasor will be named parties to the action.

[14]While this Court has recognized some exceptions to this principle, none of these is apposite to the present case. *See Martin v. Wilks*, 490 U.S. 755, 762, n.2 (1989).

[15]While the plaintiff may assert a direct action against the underinsured motorist carrier in some circumstances *under the contract of insurance*, he may not maintain such a direct action within the context of the principal tort action. *See Postlethwait v. Boston Old Colony Ins. Co.*, 189 W. Va. 532, 432 S.E.2d 802, 806 (1993). *See also Plumley v. May*, 434 S.E.2d 406 (W. Va. 1993); *Arndt v. Burdette*, 434 S.E.2d 394 (W. Va. 1993).

standard of demonstrating that the tortfeasor Defendant is acting in bad faith with regard to its interests.[16]

The result of this "forced representation" is that this Petitioner is denied the right to set forth its own defenses, to set them forth in the manner most meaningful to it and to refrain from advancing non-productive or counter-productive defenses except to the extent that it may persuade counsel for the tortfeasor Defendant to do so. Thus, the question is squarely reached as to whether such representation is adequate to assure the due process rights of the underinsured motorist carrier which the Court below failed to recognize. Also reached is the question of whether a prerequisite showing of bad faith in this regard before the underinsured motorist carrier may undertake its own defense is constitutionally sufficient to assure its due process rights.[17]

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[16]While this standard is undefined, as stated, it would encompass, at its extreme, compelling an underinsured motorist carrier to rely upon representation of the tortfeasor defendant which it believes to be incompetent and misguided, so long as it is advanced in good faith.

[17]The Court below perceives this as an effort by the underinsured motorist carrier to "control" the defense of the tortfeasor and is concerned that, if the underinsured motorist carrier were permitted to participate actively, the plaintiff might be subjected to inconsistent defenses and duplicative discovery. The Court does not indicate how, even if this were so, the situation is any different from one in which the plaintiff elects to sue jointly two or more tortfeasors. There is no question that, in such a situation, each tortfeasor would be entitled to answer separately, asserting inconsistent and opposite defense theories, and to conduct separate discovery as to the plaintiff's liability and damages claims. To the extent that such discovery might be duplicative or otherwise oppressive, the plaintiff's recourse would be to seek a protective order or other order regulating discovery pursuant to the West Virginia Rules of Civil Procedure.

A. BECAUSE THE INTERESTS OF THE TORTFEASOR DEFENDANT AND THE UNDERINSURED MOTORIST CARRIER ARE NOT ALIGNED IN MANY OR MOST INSTANCES, SUBROGATION IS AN INEFFECTIVE REMEDY TO ASSURE THAT THE TORTFEASOR DEFENDANT WILL ADEQUATELY REPRESENT THE INTERESTS OF THE UNDERINSURED MOTORIST CARRIER.

The Court below has held that a tortfeasor defendant has a duty of good faith toward the underinsured motorist carrier to protect its interests and that the underinsured motorist carrier's right to subrogation against the tortfeasor defendant is adequate to protect the underinsured motorist carrier from collusive or negligent handling of the defense by the tortfeasor defendant. While this might be effective in some instances, closer examination of the competing interests of the tortfeasor and the underinsured motorist carrier reveals that, in most instances, this view is mistaken.

Apart from the potential conflict-of-interest situation in which it places the tortfeasor defendant's counsel, addressed *supra*, note 12, this view overlooks the fact that those authorities which have considered the question have held that, for collateral estoppel purposes, there must be privity or at least unity of interest between the party which has previously litigated the issue and the party sought to be estopped from challenging the prior judgment. *See, e.g., Lawrence v. Virginia. Ins. Reciprocal*, 979 F.2d 1053 (5th Cir. 1992); *Winstead v. J.C. Penney Co.*, 933 F.2d 576 (7th Cir. 1991). With particular regard to uninsured/underinsured motorist insurance litigation, see also *Hemphill v. Home Ins. Co.*, 121 Ga. App. 323, 174 S.E.2d 251 (1970); *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515 (Ind. 1993); *Howell v. Lazaruk*, 32

Mich. App. 548, 189 N.W.2d 50 (1971), *aff'd* 388 Mich. 32, 199 N.W.2d 188 (1972); *United States Fire Ins. Co. v. Millard*, 847 S.W.2d 668 (Tex. Ct. App. 1993). Here, there is no such privity or unity of interest between the tortfeasor defendant and the underinsured motorist carrier.

The underinsured motorist carrier has little concern if the plaintiff's claim is altogether defeated so long as the judgment rendered is within the limits of the tortfeasor's liability coverage. Failing that, it wishes to minimize any excess judgment for which it may be liable. Thus, its interests are aligned with those of the tortfeasor defendant only to the extent that seeking to defeat the plaintiff's claim altogether will assure that there will be no excess judgment. Otherwise, its sole interest is to minimize the amount of recoverable damages.

Somewhat more complex are the interests of the tortfeasor defendant. Typically, his interest lies in seeking to defeat the plaintiff's claim altogether or to minimize the damages awarded to the plaintiff. Where it appears that the plaintiff will prevail upon the question of liability and will be entitled to damages in excess of the tortfeasor's liability insurance, however, the tortfeasor has, in many if not most instances, little incentive to further seek to minimize the plaintiff's recovery, the excess of which must be paid by the underinsured motorist carrier. Nor does the presence, in most instances, of a potential subrogation interest in the underinsured motorist carrier bring these disparate interests into alignment or motivate the tortfeasor defendant to faithfully discharge its duty of good faith and fair dealing toward the underinsured motorist carrier.

It is true that in every instance the underinsured motorist carrier will be subrogated, after discharging the

excess portion of the judgment, to the plaintiff's rights against the tortfeasor and will be able to seek judgment against the tortfeasor to the extent it has discharged that portion of the tortfeasor's liability to the plaintiff. However, it is equally true that people who have substantial assets which may be reached to satisfy a judgment generally guard against such a possibility by carrying sufficient liability insurance to fully discharge any reasonably foreseeable tort liability. Where, as here, the tortfeasor's liability insurance is inadequate to discharge his obligation to the plaintiff, it necessarily follows that this typically will be the result either of an unusually grave injury to the plaintiff which was beyond the bounds of reasonable foreseeability, or the fact that the tortfeasor has few assets or no assets which may be reached to satisfy an excess judgment and is, in effect, "judgment-proof."[18]

The subrogation remedy available to the underinsured motorist carrier is, in these latter instances, a hollow one and the Court below is plainly mistaken in its belief that the presence of such a "paper remedy" provides the tortfeasor incentive to minimize any excess judgment for which the underinsured motorist carrier will ultimately be liable. Such incentive exists only where, and to the extent that, the tortfeasor defendant has assets which may be reached to satisfy any eventual subrogation claim the underinsured motorist carrier might have against him. Additionally, in

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[18]Numerous, if not the majority of, underinsured motorist claims involve tortfeasors who have few or no reachable assets, carry the minimum limits of liability insurance required by the state in which they reside -- generally in the range of $25,000 -- and do not carry umbrella or other excess insurance policies. It takes little knowledge of or experience in the area of tort practice to recognize that such a sum is wholly inadequate to compensate an injured tort plaintiff (or more than one) in this day and age except in those cases where the plaintiff has not been seriously injured.

many instances, the tortfeasor defendant who clearly is liable for damages in excess of his liability coverage may be motivated to assist the plaintiff in *maximizing* the excess judgment. Numerous underinsured motorist claims involve a tortfeasor who is a friend or relative of the plaintiff.[19] Where the tortfeasor's liability insurance will be exhausted and he has no assets to be reached to satisfy the underinsured motorist carrier's subrogation claim, there is no reason why he should not wish to see a plaintiff who is a friend or relative enjoy a larger recovery than might otherwise be warranted.

Accordingly, the mere presence of a subrogation interest as to any eventual excess judgment is wholly insufficient in many or most instances to prompt the defendant to protect the interests of the underinsured motorist carrier. The Court below simply misconstrues the obvious realities of underinsured motorist litigation[20] and errs in its belief that the presence of such a subrogation interest either creates a unity of interest between the tortfeasor defendant and the underinsured motorist carrier or provides a safeguard for the underinsured motorist carrier, which is forced to rely upon the defenses interposed by the tortfeasor. Thus, the representation

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[19]Typically where the defendant was the negligent owner or operator of the vehicle involved and the plaintiff was a passenger therein.

[20]Additionally, the Court holds that unreasonable failure by an underinsured motorist carrier to consent to a settlement between the plaintiff and the defendant may constitute bad faith. Here, again, the Court fails to recognize the reality of the situation whereby counsel for the underinsured motorist carrier cannot communicate with the represented defendant and, barred from conducting discovery to which the defendant must respond, cannot learn whether the defendant has assets which may be reached in satisfaction of its potential subrogation claim. Certainly, the defendant's counsel cannot provide such information or counsel his client to do so where revelation of such information would be contrary to the defendant's interests.

by the tortfeasor defendant which is forced upon the underinsured motorist carrier by the Court below denies this Petitioner a meaningful opportunity to defend its interests in the underlying tort litigation while seeking to bind this Petitioner to the judgment to be rendered therein. Such a position clearly is repugnant to all recognized precepts of due process of law.[21]

B. The Imposition Of Conditions Upon The Right Of This Petitioner To Participate Directly In The Underlying Action, Where Such Conditions Are Not Imposed Upon Other Litigants, Constitutes A Denial Of Due Process Of Law.

Within the context of a civil action, procedural due process of law requires that a person or entity at risk of being deprived of property as a result of a judgment that may be rendered therein be granted notice of the proceeding and an opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371 (1971). While this Court has not specifically delineated the necessary elements which comprise a meaningful opportunity to be heard and to defend a civil action, it has, in its adoption of the Federal Rules of Civil Procedure, at least implied that these elements broadly include the right to answer the complaint by which the plaintiff seeks damages of that person

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[21]Nor is the situation clarified by the Court's characterization of the underinsured motorist carrier as an "excess or additional insurer carrier" which has no right to participate in the underlying litigation from which its liability may derive. This merely begs the question of whether such a limitation upon the rights of the excess or additional insurer, where it will be estopped to litigate the questions resolved in the underlying litigation to which it was not a party, effectuates a denial of due process of law.

or entity, the right to assert affirmative defenses, the right to discover the evidence upon which the complaint is based, the right to petition the court through motions, the right to present witnesses and evidence and the right to confront adverse witnesses.[22] *Cf. Nevels v. Hanlon*, 656 F.2d 372 (8th Cir. 1981) (holding that when a party is denied the right to be confronted with all adverse evidence and to cross-examine available witnesses, the procedure is constitutionally defective).

If these are the elements which comprise the constitutional *right* to due process of law within the context of a civil action, clearly they cannot be made *conditional* as the Court below seeks to do in setting up two classes of litigants -- one of whom may participate in the underlying action as a matter of right and the other of whom may do so only in certain circumstances and upon the fulfillment of certain conditions. Moreover, even where such conditions are fulfilled during the course of litigation and the underinsured motorist carrier is permitted to participate, its ability to defend will, in most instances, be impaired and it will be placed at an unfair disadvantage as a result of those conditions.

The Court below defined those conditions as permitting the underinsured motorist carrier to participate in the underlying litigation only in one of three circumstances: (1) where the tortfeasor defendant explicitly or implicitly waives his right to defend in favor of the underinsured motorist

[22]This is the same standard implicitly prevailing under West Virginia State law insofar as West Virginia has adopted, virtually intact, the Federal Rules of Civil Procedure.

carrier;[23] (2) where the underinsured motorist carrier and the tortfeasor defendant jointly present a unified defense; and (3) where the underinsured motorist carrier can demonstrate that the tortfeasor defendant is defending in bad faith with regard to the underinsured motorist carrier's interests.

1. Waiver Of Tortfeasor's Right To Defend In Favor Of The Underinsured Motorist Carrier.

With regard to the first circumstance, no constitutional problem is encountered where the tortfeasor defendant fails to appear and defend or waives his right to defend -- allowing the underinsured motorist carrier to advance the defense of the action -- early in the litigation. However, where this occurs later in the litigation, the position of the underinsured motorist carrier may already have been irreparably harmed. The extreme (and typical) example of this occurs where the tortfeasor defendant, on the eve of trial, tenders the policy limits of his liability coverage and settles with the plaintiff, leaving the underinsured motorist claim alone to be litigated, often without the presence of the defendant in the court room.

Suddenly, the underinsured motorist carrier is cast in the position of having to defend the entire action after having been deprived of the opportunity to plead its available defenses, to develop the evidence or to favorably posture the case through motions. Significantly, at such a juncture the underinsured motorist carrier will not have retained necessary expert witnesses and, because it has no contract or agreement with them, will be unable to use those retained by the

[23]Including the situation in which the defendant's insurer refuses to provide a defense, the defendant fails to retain his own counsel and default judgment may result.

tortfeasor defendant.[24] Because it has already been observed in practice that some plaintiff's attorneys construe the decision below to require only that a single notice be sent to the underinsured motorist carrier and that it need not be provided copies of pleadings and other papers, the underinsured motorist carrier's litigation file in such an instance, in addition to all else, is likely to be incomplete. While it may seek a continuance of the trial in order to remedy these problems and adequately prepare, such a remedy is discretionary with the trial court. Thus, the underinsured motorist carrier's right to a meaningful opportunity to be heard is compromised where it is subjected to the wide discretion of the trial judge and, if a continuance is denied, can only be enforced by meeting the high standard of showing abuse of discretion on the part of the judge.

Additionally, by the time the underinsured motorist carrier actively enters the case, its position may already be compromised through admissions made by the tortfeasor in response to requests for admissions, affirmative defenses not asserted or developed, motions which were or were not made, and evidence which was or was not developed during the course of discovery. The net result is that, in the commonplace instance where the defense of the matter is thrust upon the underinsured motorist carrier at the eleventh-hour or any time other than the outset of the litigation, the underinsured motorist carrier is at great risk of being deprived of its right to a meaningful hearing characterized by the opportunity to advance every defense available to it in the manner it deems most beneficial.

[24] *A fortiori* it is not uncommon for a settlement agreement in such a situation to require that the tortfeasor defendant not make his experts available to other litigants remaining in the case.

2. JOINT, UNIFIED DEFENSE IN CONJUNCTION WITH THE TORTFEASOR DEFENDANT.

Many of the foregoing problems are obviated where the tortfeasor defendant and the underinsured motorist carrier jointly defend the action. This standard, however, fails to recognize that, while there is significant overlapping of their interests in the litigation, there is also significant divergence of interests as heretofore addressed. Where these interests diverge, it can readily be anticipated that each party will summarily reject asserting defenses, advancing litigation tactics or developing the case in a manner unfavorable to its interests, while favoring the interests of the other party. Thus, unless there is *complete* unity of interest throughout the entire course of the litigation, the defenses of both the tortfeasor defendant and the underinsured motorist carrier are reduced to a "least common denominator" and both are denied the opportunity to vigorously assert all of their available defenses in the manner deemed to be most beneficial and productive.

For this reason alone, it would generally be an exercise in foolishness for a tortfeasor defendant to consent to such an arrangement. More importantly, this option reduces the underinsured motorist carrier's right to a meaningful opportunity to be heard to one which may only be exercised (in compromised fashion) at the whim of the tortfeasor to whom the underinsured motorist carrier is potentially adverse. It requires no citation to authority to observe that constitutional guarantees cannot be conditioned in such a manner.

3. Intervention Upon Showing Of Bad Faith On The Part Of The Tortfeasor Defendant In Representing The Underinsured Motorist Carrier's Interests.

The most pernicious of the three options is the bad faith standard enunciated by the Court below whereby the underinsured motorist carrier may seek to actively participate in the underlying litigation if it can demonstrate that the tortfeasor defendant is acting in bad faith with regard to protecting the underinsured motorist carrier's interests.[25] At the outset, the standard to be met is unduly high. While the Supreme Court of Appeals has not defined the term "bad faith," it has construed the term "good faith" as importing a standard whereby the person charged with acting in good faith, at minimum, acts non-negligently. *Martin v. Mullins*, 170 W. Va. 358, 294 S.E.2d 161 (1982). It is unclear whether it was the intention of the Court below to apply such an "objective good faith standard" to the present circumstances or to apply one of "subjective good faith," whereby no conduct on the part of the party charged, no matter how egregious, violates the standard so long as it is done with pure

[25]This is a significantly higher standard than the standard relating to intervention under Federal Rule of Civil Procedure 24 and West Virginia Rule of Civil Procedure 24. Under these rules, it is merely required that the intervenor show that its interests are not adequately represented by the parties to the litigation. This may be established by a mere showing that the interests of the absentee and the party are divergent, as they are here. *See* 7C Charles A. Wright, et al., *Federal Practice & Procedure* §^F 1909, at 346 (1986 & Supp. 1993); *see also Stadin v. Union Elec. Co.*, 309 F.2d 912, 919 (8th Cir. 1962), *cert. denied*, 373 U.S. 915 (1963) (Blackmun, J.) ("The rule is that representation is adequate if . . . the representative does not have an interest adverse to the proposed intervenor . . . .").

intentions. Either standard, however, is constitutionally deficient.

First, both standards preclude active participation by the underinsured motorist carrier at the outset of the litigation. By the time the underinsured motorist carrier does enter the litigation, the prospect of its position having already been compromised through admissions made by the tortfeasor in response to requests for admissions, affirmative defenses not asserted or developed, motions which were or were not made, and evidence which was or was not developed during the course of discovery, as addressed above, is a distinct likelihood.

Under the objective good faith standard, the underinsured motorist carrier must demonstrate at the threshold that the defense of its interests has been negligently handled by the tortfeasor defendant, posing the distinct probability that its chances of success in the litigation have been jeopardized as a result. Under the subjective good faith standard, the underinsured motorist carrier could continue to be subjected to forced representation which is incompetent and misguided so long as it is advanced in good faith. Where bad faith can be proven, it is almost a certainty that the underinsured motorist carrier's defenses will have been severely damaged, collusively or otherwise, before it is entitled to protect its interests. Even at this stage, it is again within the discretion of the trial court to permit the underinsured motorist carrier to participate actively in the litigation and the underinsured carrier is doubly-cursed if it must meet the standard of demonstrating that a trial judge's refusal to do so is arbitrary and constitutes an abuse of discretion.

Thus, none of the three vehicles afforded by the Court below for the underinsured motorist carrier actively to defend its interests is sufficient to permit the carrier to do so effectively in all or most instances. Each is constitutionally repugnant in that, in most instances, it requires the underinsured motorist carrier to litigate from a compromised position and because each conditions the participation of the underinsured motorist carrier upon the arbitrary whim of the tortfeasor defendant or the broad discretion of the trial judge. As such, they reduce a constitutional right to a mere privilege to be granted or denied as the tortfeasor defendant or the trial judge deem appropriate, casting the heavy burden of proving any wrongful denial of its petition to participate actively upon the underinsured motorist carrier. It is only in exceptional circumstances that they permit the underinsured motorist carrier full opportunity to present every available defense in the most beneficial manner as required under the Fourteenth Amendment.

III. CONCLUSION.

It is clear under the prior decisions of this Court that the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that a person or entity in jeopardy of being deprived of property pursuant to judicial proceedings must be accorded a meaningful opportunity to defend and protect its interests, characterized by the opportunity to vigorously advance all defenses available to it. The decision of the Supreme Court of Appeals of West Virginia in the instant case seeks to deprive this Petitioner of that right in litigation which will be binding upon it by depriving it of the right to directly participate therein. Each of the safeguards of this Petitioner's rights perceived by the Supreme Court of Appeals is insufficient in all or most factual

instances to assure that the opportunity and motivation exist for all defenses available to this Petitioner to be vigorously asserted. It accords this Petitioner a lesser measure of due process of law than the prior decisions of this Court clearly mandate and is directly in conflict therewith. The decision of the Supreme Court of Appeals herein should be reversed and remanded to be harmonized with those decisions and this Petitioner respectfully so prays.

RESPECTFULLY SUBMITTED,

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